Proskauer

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A report to clients and friends of the Firm

Edited by **Russell L. Hirschhorn**

## Editor's Overview

This month we highlight a recent decision from the Ninth Circuit, *Quan v. Computer Sciences Corp.*, in which the Court adopted the *Moench* presumption of prudence in evaluating the viability of employer stock drop claims. The decision is significant because two prior Ninth Circuit rulings had failed to specifically endorse the presumption. Now that the *Moench* presumption of prudence has been adopted by five Circuit Courts and rejected by none, we are hopeful that the issue of whether the *Moench* presumption of prudence should apply to a plan fiduciaries' decision to allow investment in an employer stock fund can finally be put to rest.

We also take the opportunity to re-publish a client alert that addressed the final regulation issued by the U.S. Department of Labor ("DOL") on fiduciary requirements for participant disclosure in participant-directed individual account plans. In the same publication, the DOL also provided, not insignificantly, a final amendment to its regulation under ERISA § 404(c).

As always, be sure to review the section on *Rulings, Filings and Settlements of Interest*.

## Third Time's the Charm: Ninth Circuit Finally Adopts *Moench* Presumption of Prudence[1]

Contributed by Yolanda D. Montgomery

In *Quan v. Computer Sciences Corp.*, Nos. 09-56190, 09-56248, 2010 WL 3784702 (9th Cir. Sept. 30, 2010), the Ninth Circuit joined the Third, Fifth, *Sixth* and Seventh Circuits in adopting the presumption of prudence first espoused in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), pursuant to which a plan fiduciary's decision to permit investment in employer stock is reviewed for an abuse of discretion. The decision is important because two prior Ninth Circuit

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rulings had failed to endorse the presumption. With the Ninth Circuit now joining the fold, the prospects of a Circuit Court split on the issue are rapidly becoming more remote. However, the decision does not narrow the divide among the courts on other issues impacting stock drop litigation.

**Background**

Computer Sciences Corporation (CSC) offered its employees the opportunity to invest in a participant directed 401(k) plan. The plan provided participants full discretion to allocate their contributions among fourteen diverse investment alternatives, one of which was required to be the CSC Stock Fund.

In their complaint, plaintiffs alleged that there were "material weaknesses in CSC's stock option granting and tax accounting practices," which ultimately caused the price of CSC stock to decline once disclosed. In support of their claims, plaintiffs pointed out that CSC's stock price declined from $55.88 to $48.56 the day following announcements on June 29, 2006 that: (i) the Securities and Exchange Commission made an informal request for information about its stock option granting practices; and (ii) the company was no longer for sale and had decided to repurchase up to $2 billion of its common stock. The decline in the price of the stock was only temporary. The stock rebounded to $52.72 within a week, to $53.57 within two weeks, and to $61.79 approximately one year later. By this time, the SEC had issued new guidance on how the measurement date for stock options was to be determined, and CSC had established a special committee of directors to oversee an internal investigation of CSC's stock option granting practices. Although, there was no wrongdoing found, the special committee identified over 9,000 stock option grants that needed to be re-priced and certain income tax deficiencies. After re-pricing its stock options and correcting the tax deficiencies, CSC restated its financial statements on June 13, 2007 and on January 11, 2008.

The Complaint alleged that CSC, the CSC Retirement Committee (Committee), and current and former officers and directors of CSC Plaintiffs alleged that all defendants breached their fiduciary duties under ERISA by imprudently investing 401(k) plan assets in CSC stock (prudence claim), negligently misrepresenting and failing to disclose material information about CSC's financial condition to plan participants (disclosure claim) and failing to properly appoint, monitor and disclose information to the Committee and its members.

## The Ninth Circuit's Opinion

**The Prudence Claim**

With respect to plaintiffs' prudence claim, the Ninth Circuit resolved a question left open in two of its prior decisions, *Wright v. Oregon Metallurgical Corp*., 360 F.3d 1090, 1098 (9th Cir. 2004) and *In re Syncor ERISA Litig*., 516 F.3d 1095, 1102 (9th Cir. 2008), by adopting the *Moench* presumption of prudence. The Court determined that the *Moench* presumption was consistent with ERISA's statutory text and trust law principles, and that it struck the "appropriate balance between the employee ownership purpose of employee stock ownership plans and eligible individual account plans and ERISA's goal of ensuring proper management of such plans." The Court also stated that the presumption would alleviate the pressure on plan fiduciaries to "predict the future of the company stock fund's performance" because it makes it "less likely that a plan fiduciary would be tempted to use insider information to divest the plan from company stock, since continued investment in the plan will be presumed prudent."

The Court stated that it was not persuaded by either of the concerns about the *Moench* presumption raised in *Wright*. First, in response to the *Wrigh*t Court's observation that the *Moench* presumption was difficult to reconcile with ERISA's diversification exemption under Section 404(a)(2), 29 U.S.C. § 1104(a)(2), the Court stated that it did not understand "the *Moench* presumption to apply to a 'diversification' claim, because a presumption of prudence is unnecessary where fiduciaries are not subject to a prudence requirement to begin with." Second, the Court concluded that the *Moench* presumption did not, as the *Wright* Court suggested, encourage fiduciaries to engage in insider trading. Rather, *Moench* provides fiduciaries a safe harbor from failing to use insider information to divest from employer stock. The Court explained that if the burden to rebut the presumption of prudent investment was sufficiently heavy, plan fiduciaries would not be tempted to act on insider information to protect themselves from liability for decisions about continued investment in employer stock.

The Court next opined that in order to rebut the presumption, plaintiffs must "make allegations" that call into question the company's viability as an ongoing concern *or* prove a "precipitous decline" in the company's stock price in conjunction with evidence that the company is "on the brink of collapse" or "is undergoing serious mismanagement." Additionally, the Court stated that plaintiffs must show that there were "publicly known facts that would trigger the kind of 'careful and impartial investigation' by a reasonable fiduciary" and that the plan's fiduciary failed to perform that investigation.

Ultimately, the Court concluded that plaintiffs failed to provide evidence that it was unreasonable for plan fiduciaries to believe that CSC would withstand the issues associated with stock options pricing and income tax accounting in light of its internal investigation of those problems. The Court also rejected plaintiffs' assertion that plan fiduciaries should have acted on insider information to divest the plan of company stock, stating that it need not address this issue because CSC did not encounter problems "grave enough to rebut the *Moench* presumption." In any event, the Court stated, ERISA fiduciaries are not obligated to violate securities laws in an attempt to satisfy their fiduciary duties.

The Court also determined that plaintiffs failed to point to any evidence that generated a genuine issue of material fact that defendants failed to investigate the merits of continued investment in the CSC stock fund. First, the Court concluded that mere stock fluctuations, even those that trend downward, were insufficient to establish the requisite imprudence to rebut the *Moench* presumption. Second, the Court stated the district court did not engage in a faulty analysis by considering that defendants might have been sued if they ceased offering the CSC stock fund as an investment option under the plan. Third, the Court concluded that a one-day drop in CSC's stock price was insufficient to show that defendants did not properly investigate the continued investment in the CSC stock fund. In so ruling, the Court observed that while "'[a] violation may occur where a company's stock did not trend downward over time, but was artificially inflated during that time *by an illegal scheme* about which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed," plaintiffs did not argue that any alleged problems in the handling of stock options, which purportedly caused the one-day drop in CSC's stock price, amounted to an 'illegal scheme.'" (Emphasis in original.) Fourth, the Court rejected plaintiffs' assertion that defendants' knowledge of problems associated with CSC's stock option granting practices and accounting for income taxes showed that defendants failed to evaluate the merits of continued investment in the stock fund. The Court determined that defendants responded to any "red flag" issues by conducting an investigation and addressing the alleged problems. Fifth, the Court stated that plaintiffs failed to show a casual link between the failure to investigate or [divest] and the harm suffered by the plan.

#### The Disclosure Claim

With respect to plaintiffs' disclosure claim, the Court concluded that even if CSC made misrepresentations with respect to its stock option pricing, the misrepresentations were at no point "material" because a reasonable participant would not have been misled by the statements in making a decision whether to invest in the CSC stock fund.

#### Award of Costs

Because the district court did not provide any explanation for its decision to deny defendants' application for costs, the Ninth Circuit remanded this issue to the district court for further proceedings.

#### Proskauer's Perspective

Now that the *Moench* presumption of prudence has been adopted by five Circuit Courts and rejected by none, we are hopeful that the issue of whether the *Moench* presumption of prudence should apply to a plan fiduciaries' decision to allow investment in an employer stock fund can finally be put to rest. There remains some uncertainty, however, as to the type of evidence that will be sufficient to rebut the presumption and, correspondingly, the type of allegations that will be deemed sufficient to withstand a motion to dismiss. Hopefully, the courts will soon reach a consensus on these issues as well.

## U.S. Department of Labor Issues Final Regulation on Fiduciary Requirements for Participant Disclosure in Participant-Directed Individual Account Plans & A Final Amendment to the Regulation under ERISA Section 404(c)[2]

By Ira Bogner, Steven Weinstein, Russell L. Hirschhorn and Michael Spencer

On October 14, 2010, the U.S. Department of Labor ("DOL") issued a final regulation under the Employee Retirement Income Security Act of 1974 ("ERISA") setting forth the fiduciary requirements for disclosure in participant-directed individual account plans, e.g., 401(k) plans.

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For plan years beginning on or after November 1, 2011, plan administrators must disclose to plan participants and beneficiaries who have the right to direct the investment of assets held in their accounts (referred to herein as "participants and beneficiaries") both plan-wide and individual fee and expense information that may be charged against their plan accounts. The stated purpose of the regulation is "to ensure that all participants and beneficiaries in participant-directed individual account plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings."

The new disclosure rules will apply to all covered participant-directed individual account plans, whether or not such plans meet the fiduciary liability exemption requirements of ERISA § 404(c). The DOL guidance also includes a final amendment to the existing regulation issued under ERISA § 404(c), 29 C.F.R. § 2550.404c-1.

### Final Rule § 2550.404a-5 Concerning Fiduciary Requirements for Disclosure

The final regulation sets forth the disclosure requirements to participants and beneficiaries in participant-directed individual account plans. The disclosure requirements provide answers to the following four questions:

(a) Who has the responsibility for disclosing information to participants and beneficiaries in participant-directed individual account plans?

(b) What information must be disclosed to participants and beneficiaries in participant-directed individual account plans, and what are the special rules for dealing with employer securities, annuities, fixed-return investments and target date funds?

(c) What form of disclosure is required to participants and beneficiaries in participant-directed individual account plans?

(d) When must information be disclosed to participants and beneficiaries in participant-directed individual account plans?

### Who has the responsibility for disclosing information to participants and beneficiaries in participant-directed individual account plans?

The final regulation requires the plan administrator, as defined in ERISA § 3(16), of a covered individual account plan to take steps to ensure that participants and beneficiaries are made aware of their rights and responsibilities with respect to the investment of their account assets, and are provided sufficient information regarding the plan and designated investment alternatives, including fees and expenses, to make informed decisions with respect to the management of their accounts. Under the regulation, the plan administrator will not be liable for the completeness and accuracy of information used to satisfy the regulation's disclosure requirements when the plan administrator "reasonably and in good faith" relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative.

### What information must be disclosed to participants and beneficiaries in participant-directed individual account plans, and what are the special rules for dealing with employer securities, annuities, fixed-return investments and target date funds?

The DOL guidance applies only to a "covered individual account plan," which includes any participant-directed individual account plan, as defined in ERISA § 3(34), except that it shall not include plans involving individual retirement accounts or individual retirement annuities described in sections 408(k) or 408(p) of the Internal Revenue Code.

The final regulation sets forth four categories of information that must be disclosed to participants and beneficiaries of "covered individual account plans": (a) general plan-related operation and identification information, (b) administrative expenses, (c) individual expenses and (d) information on the investment alternatives.

*General Operational and Identification Information.* The regulation requires that participants and beneficiaries in covered individual account plans be provided with: (a) an explanation of the method for providing investment instructions, (b) an explanation of any specified limitations on such instructions, including any restrictions on investment transfers, (c) a description of, or reference to, plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment, and any restrictions on these rights, (d) an identification of any designated investments alternatives offered under the plan, (e) an identification of any investment managers, and (f) a description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

*General Plan Administrative Expenses.* The final regulation requires that the plan administrator provide participants and beneficiaries with an explanation of any fees and expenses that may be charged for general plan administrative services and the basis on which such charges will be allocated, e.g., pro rata or per capita, and the amounts that are actually charged for such fees and expenses.[1] Excluded from this requirement are fees and expenses included in the total annual operating expenses of any designated investment alternative.

The final regulation adds a new requirement from the proposed regulation, which is intended to provide participants in plans that have administrative expenses underwritten by investment alternatives offered under the plan (e.g., through revenue sharing arrangements) with a clearer understanding as to how those costs are underwritten, at least in part, by fees and expenses associated with such investment alternatives. Thus, to the extent applicable, a statement of administrative expenses charged to an account must include a statement that some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives.

*Individual Expenses.* The final regulation requires that participants and beneficiaries be provided with an explanation of any fees and expenses that may be charged against their individual accounts on an individual, rather than a plan-wide basis, and which are not reflected in the total annual operating expenses of any designated investment alternative.[2]

*Investment-Related Information.* The final regulation requires plan administrators to disclose automatically to each participant and beneficiary certain identifying information about each designated investment alternative. The disclosure shall include the name of each designated investment alternative and the type or category of the investment, e.g., money market fund, balanced fund, large-cap stock fund, or employer stock fund.

In addition, for each designated investment alternative with no fixed return, plan administrators must automatically disclose certain performance data and benchmarks. The disclosure must provide the average annual total return of the investment for 1, 5, and 10 calendar year periods (or for the life of the investment alternative, if shorter) ending on the date of the most recently completed calendar year, along with a statement indicating that an investment's past performance is not necessarily indicative of future performance. It also must include the name and returns of an "appropriate broad-based securities market index" over the same periods, which is not administered by an affiliate of the investment issuer, its investment adviser or a principal underwriter, unless the index is widely recognized and used.

For designated investment alternatives with a fixed or stated return for the term of the investment, the disclosure must include both the fixed or stated annual rate of return and the term of the investment. If the issuer reserves the right to adjust the return prospectively, the disclosure must state that (and how to obtain the most recent rate of return), and include the current rate of return, as well as the minimum rate guaranteed under the contract, if any.

The final regulation also requires the disclosure of specified fee and expense information pertaining to each designated investment alternative. For designated investment alternatives with no fixed return, the disclosure must provide: (a) the amount and a description of each shareholder-type fee charged directly against an investment, which is not included in the total annual operating expenses of the investment alternative[3] as well as a description of any restriction or limitation that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part, (b) the total annual operating expenses of the investment expressed as a percentage, e.g., expense ratio, (c) the total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a $1,000 investment, (d) a statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investments, and (e) a statement that the cumulative effect of fees and expenses can substantially reduce the growth of an individual's retirement account and that participants and beneficiaries can visit the web site of the Employee Benefits Security Administration for an example demonstrating the long-term effect of fees and expenses.

For designated investment alternatives with a fixed return or stated return for the term of the investment, the disclosure must provide the amount and description of any shareholder-type fees and a description of any restriction or limitation that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part.

The final regulation also requires that the plan administrator provide an internet address that is sufficiently specific to lead participants and beneficiaries to the following supplemental information: (a) the name of the investment alternative's issuer, (b) the investment alternative's objectives or goals, (c) the investment alternative's principal strategies (including a general description of the types of assets held by the investment) and principal risks, (d) the investment alternative's portfolio turnover rate, (e) the investment alternative's performance data, and (f) the investment alternative's fee and expense information.

The final regulation also requires that participants and beneficiaries be provided a glossary of terms to assist them in understanding the designated investment alternatives, or an internet address that provides access to such a glossary, along with a general explanation of the purpose of the address.

*Special Rules for Qualifying Employer Securities, Annuities, Fixed Return Investments and Target Date Funds.* The final regulation contains special rules for disclosures related to performance data, benchmarks, and fee and expense information and certain internet information for qualifying employer securities, annuities, fixed-return investments and target date funds.

Qualifying employer securities are exempted from the requirements concerning the internet web site disclosure of an investment's principal strategies and risks, and instead require an explanation of the importance of a well-balanced and diversified investment portfolio. The final regulation contemplates that the plan administrator will use the language provided in Field Assistance Bulletin 2006-03 to satisfy this requirement.[4] The final regulation also exempts qualifying employer securities from: (a) the internet web site requirements relating to the portfolio turnover rate, and (b) unless the investment is a unitized fund, the requirement to disclose fee and expense information, an expense ratio, and total annual operating expenses as a dollar amount per $1,000 invested. In addition, for an investment consisting of qualifying employer securities that are publicly traded on a national exchange or generally recognized market and that is not a unitized fund, the definition of average annual total return means the change in value of an investment in one share of stock on an annualized basis over a 1, 5, or 10 year period, assuming dividend reinvestment, which is commonly referred to as total shareholder return. This definition also applies to an investment consisting of qualifying employer securities that are not publicly traded on a national exchange or generally recognized market provided the investment is not a unitized fund, with the change in value of such securities calculated using principles similar to those applied for publicly traded securities.

With respect to annuity options, the final regulation requires that, in lieu of information required for other investment alternatives, the plan administrator provide the following information: (a) the name of the contract, fund or product, (b) the objectives or goals of the option, (e.g. to provide a stream of fixed retirement income payments for life), (c) the benefits and factors that determine the price of the guaranteed income payments, (d) any limitations on the ability of a participant or beneficiary to withdraw or transfer amounts allocated to the option and any fees or charges applicable to such withdrawals or transfers, (e) any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option, (f) a statement that guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability, and (f) an internet address that provides certain information. The web site is required to include:  (a) the name of the option's issuer and of the contract, fund or product, (b) a description of option's objectives or goals, (c) the option's distribution alternatives/guaranteed income payments, including any limitations on the right of a participant or beneficiary to receive such payments, (d) the costs and/or factors taken into account in determining the price of benefits under the option's distribution alternatives/guaranteed income payments, (e) any limitations on the right of a participant or beneficiary to withdraw or transfer amounts allocated to the option and fees or charges applicable to withdrawal or transfer, and (f) any fees that will reduce the value of amounts allocated by participants and beneficiaries to the option.

The final regulation also provides special rules that clarify and limit the information that must be disclosed at the required web site address for fixed-return investments.  These special rules require the disclosure of: (a) the name of the investment alternative's issuer, (b) the objectives and goals of the investment alternative, (c) the investment alternative's performance data updated on at least a quarterly basis, and (d) the investment alternative's fee and expense information.

The final regulation states that the DOL intends to publish a separate notice of proposed rulemaking that would supplement otherwise applicable disclosures in this rule for target date-type funds.

*   *   *

The final regulation also noted that there may be "extraordinary situations when fiduciaries will have a disclosure obligation beyond those addressed" in this regulation, including the requirement as to timing of the required disclosures described below.  As an example, the regulation refers to a situation in which a fiduciary knew that, due to fraud, information contained in a public financial report would mislead investors concerning the value of a designated investment alternative.  In such a situation, according to the DOL, a fiduciary would have an obligation to disclose the information or prevent additional investments until the relevant information was made public.

### What form of disclosure is required to participants and beneficiaries in participant-directed individual account plans?

The investment related information summarized above must be provided in a chart, or similar format, that is designed to facilitate a comparison of such information for each designated investment alternative available under the plan. The date of the chart must be prominently displayed and must include a statement: (a) indicating the name, address and telephone number of the plan administrator (or its designee) to contact for information, (b) that additional investment-related information is available at the listed internet addresses, and (c) explaining how to request and obtain, free of charge, paper copies of the information required to be made available on a web site.  In addition, the chart must include a statement indentifying who a participant or beneficiary can contact for: (a) copies of prospectuses, (b) copies of financial statements or reports, (c) a statement of the value of a share or unit of each designated investment alternatives, as well as the date of valuation, and (d) a list of assets comprising the portfolio of each designated investment alternative, which constitutes "plan assets" and the value of each such asset (or the proportion of the investment it comprises). The plan administrator may satisfy these requirements by using and accurately completing the Model Comparative Chart provided by the DOL in the Appendix to the final regulation.

The final regulation provides that general plan information related to the identification of investment alternatives offered under the plan, investment managers, investment instructions and limitations attendant thereto may be provided as part of the plan's summary plan description or as part of a benefit statement furnished pursuant to ERISA. The information provided must be written in a manner calculated to be understood by the average plan participant, and fee and expense information may be expressed in terms of a monetary amount, formula, percentage of assets or per capita charge, unless a provision of the regulation explicitly requires it to be expressed otherwise.

The DOL noted in the preamble to the final regulation that it is exploring whether, and possibly how, to modify the standards applicable to electronic distribution of required plan disclosures and that, pending that review, the general disclosure regulation at 29 C.F.R. § 2520.104b-1 applies to material furnished under this regulation, including the safe harbor for electronic disclosures.

### When must information be disclosed to participants and beneficiaries in participant-directed individual account plans?

The final regulation requires that the disclosures of general information, general plan expense information, individual expense information and investment related information under the regulation, as summarized above, be provided on or before the date on which a participant or beneficiary can first direct his or her investments. Such information is also required to be disclosed annually. If there is a change to the general operational and identification information and fee and expense information, a description of the change generally must be provided at least 30 days, but not more than 90 days, in advance of the effective date of the change. The only exception to this rule is for events that were unforeseeable or circumstances beyond the control of the plan administrator, in which case notice of such change must be provided as soon as reasonably practicable. Because the DOL views all changes as "material," all changes must be disclosed, and the materiality requirement stated in the proposed regulation has been eliminated.

Plan administrative expenses *actually* charged to a participant's or beneficiary's account must be disclosed at least quarterly, and must include a description of the services to which the charges relate and the dollar amounts fees *actually* charged during the preceding quarter.

Similarly, the final regulation requires quarterly disclosure of the dollar amount of the fees and expenses that are *actually* charged during the preceding quarter to a participant's or beneficiary's account and a description of the services to which the charges relate. To the extent such expenses are disclosed during a quarter, for example by a confirmation statement after a charge is deducted from an account, they need not be disclosed on the subsequent quarterly statement.

**Transitional Rules**

Although the final regulation is effective December 20, 2010, it is applicable to plan years beginning on or after November 1, 2011. As such, the DOL has included transitional rules for satisfying the initial disclosure requirements required under the regulation. The initial disclosures required on or before the first date on which a participant or beneficiary can first direct his or her investment must be furnished no later than 60 days after the rule's applicability date to participants or beneficiaries who had the right to direct the investments held in, or contributed to, their individual accounts on the applicability date.

The final regulation also provides relief from the disclosure requirements for returns over a 5- and 10- year period for certain designated investment alternatives. For plan years beginning before October 1, 2021, if a plan administrator reasonably and in good faith determines it does not have information on expenses attributable to the plan that is necessary to calculate the 5-year and 10-year average annual total returns for a designated investment alternative not registered under the Investment Company Act of 1940, the plan administrator may use a reasonable estimate of such expenses or it may use the most recently reported total annual operating expenses of the investment alternative as a substitute for such expenses. If the plan administrator does so, it must inform the participants and beneficiaries of the basis on which the returns were determined.

### Final Amendment to the Regulation under ERISA Section 404(c)

The final regulation also amends the rules applicable to ERISA § 404(c) plans, compliance with which will exempt the plan's fiduciaries from liability for investment decisions made by participants and beneficiaries. This amendment integrates the new disclosure requirements of the final regulation for section 404(a) into the existing section 404(c) regulation to avoid having different disclosure requirements for plans intending to comply with the ERISA § 404(c) requirements. Accordingly, all self-directed individual account plans must comply with the new disclosure regulations. The DOL also reiterated its view that the disclosure requirements embodied in the final regulation do not relieve a fiduciary from its duty to prudently select and monitor service providers or designated investment alternatives offered under the plan.

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[1] Such general plan administrative expenses may include legal, accounting and recordkeeping fees, that may be charged against, or affect the balance of, individual accounts.

[2] Such individual expenses may include fees attendant to processing plan loans or qualified domestic relations orders, fees for investment advice, fees for brokerage windows, commissions, front or back-end loads or sales charges, redemption fees and similar expenses, and optional rider charges in annuity contracts.

[3] Such shareholder type fees may include commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees.

[4] FAB 2006-03 provides: "To help achieve long-term retirement security, you should give careful consideration to the benefits of a well-balanced and diversified investment portfolio. Spreading your assets among different types of investments can help you achieve a favorable rate of return, while minimizing your overall risk of losing money. This is because market or other economic conditions that cause one category of assets, or one particular security, to perform very well often cause another asset category, or another particular security to perform poorly. If you invest more than 20% of your retirement savings in any one company or industry, your savings may not be properly diversified. Although diversification is not a guarantee against loss, it is an effective strategy to help you manage investment risk."

## Rulings, Filings and Settlements of Interest

- In *Matschiner v. Hartford Life & Accident Ins. Co.*, 2010 WL 3910217 (8th Cir. Oct. 7, 2010), the Eighth Circuit applied the "plan documents rule" established by the Supreme Court in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 129 S.Ct. 865 (2009), and concluded that Hartford properly paid benefits pursuant to a beneficiary designation form rather than a Nebraska state divorce decree that purported to divest the decedent's ex-husband of his right to the benefits.
- In *Leimkuehler v. American United Life Insurance Co*., 2010 U.S. Dist. LEXIS 114121 (S.D. Ind. Oct. 22, 2010), a district court denied defendant's motion for judgment on the pleadings with respect to the plan trustee's fiduciary breach claim based on American United Life's ("AUL's") alleged failure to disclose its revenue sharing agreements with the mutual funds that it packaged as investment options. In so ruling, the court found the Seventh Circuit's decision in *Hecker v. Deere* inapplicable because the revenue sharing in *Hecker* occurred between two non-fiduciaries, whereas, in this case, "AUL was alleged to have received shared revenue as a plan fiduciary, with its attendant higher legal duties." The court dismissed plaintiff-trustee's prohibited transaction claims, however, because mutual fund monies out of which shared revenue is paid are not plan assets.
- In *Jones v. MEMC Electronic Material, Inc.*, 2010 WL 4065202 (E.D. Mo. Oct. 18, 2010), the court granted MEMC Electronic Material, Inc.'s motion for reconsideration of its decision denying defendants' motion to dismiss plaintiffs' employer stock drop claims. In so ruling, the court acknowledged that it had erroneously relied on *Braden v. Wal-Mart*, 588 F.3d 585 (8th Cir. 2009) in concluding that plaintiffs' complaint satisfied the pleading requirements of Fed. R. Civ. P. 12(b)(6) because *Braden* did not address employer stock drop claims and, in particular, the *Moench* presumption of prudence.
- In *Yost v. First Horizon Nat'l Corp*., 2010 WL 4116986 (W.D. Tenn. Oct. 19, 2010), the court denied defendants' motion for reconsideration of the court's earlier decision denying defendants' motion to dismiss plaintiffs' employer stock drop claims. In so ruling, the court acknowledged that other courts have granted motions to dismiss based on the *Moench* presumption of prudence, but observed that such rulings were outside the Sixth Circuit and that defendants failed to note any change of law within the Sixth Circuit.
- In *Pfeil v. State Street Bank and Trust Co.*, 2010 WL 3937165 (E.D. Mich. Sept. 30, 2010), a district court dismissed plaintiffs' employer stock drop claims against State Street, the plan's independent fiduciary. Although the court concluded that plaintiffs sufficiently alleged "red flags" that should have alerted State Street to the need to discontinue the company stock investment option, it found that plaintiffs failed to adequately allege causation. In so ruling, the court stated that the "Plans at issue allow the participants to change the allocation of the assets from one account to another on any business day. Plaintiffs had total control over how to allocate their assets . . . . Plaintiffs had knowledge . . . that GM was in financial trouble yet they continued to invest in

the [company stock]. State Street cannot be held liable for actions which Plaintiffs controlled."

- In *Taylor v. ANB Bancshares, Inc.*, 2010 WL 4053575 (W.D. Ark. Oct. 14, 2010), a district court adopted a magistrate judge's report and recommendation and denied defendants' motion to dismiss plaintiffs' employer stock drop claims. The report and recommendation concluded that, even if the *Moench* presumption of prudence applied, plaintiffs alleged that defendants knew or should have known that the escalation in ANB's brokered deposits and in its non-current real estate, construction, and commercial loans, and other unsafe and unsound banking practices, made ANB stock an imprudent investment for the Plan. In addition, the court observed that, contrary to defendants' contentions, defendants were allegedly on notice of the potential demise of the Bank since there were reports that placed ANB on a "watch list" for "banks that deserve close attention." The court also allowed some of plaintiffs' disclosure claims to proceed, finding that plaintiffs sufficiently alleged that defendants breached their fiduciary duties by making misstatements about the stock's share value and by failing to disclose ANBs' financial and regulatory difficulties to the plan's participants. The court did, however, dismiss plaintiffs' disclosure claim based on an email from the vice president of human resources telling plan participants that they could purchase ANB stock at its value of $36.60 because she was not acting as a fiduciary when she sent the e-mail. The court determined that even if the email was inaccurate, a "clear reading of the e-mail reveals that it is merely an employee communication, and that [the vice president] was not encouraging, promoting, or directing Plaintiffs to invest in the stock."
- In *In re Suntrust Banks, Inc. ERISA Litig.*, No. 08-cv-03384 (N.D. Ga. Oct. 25, 2010), a district court dismissed plaintiffs' employer stock drop claims insofar as they were merely alleging a failure to diversify, but refused to dismiss fiduciary breach claims based on the failure to adequately inform participants about SunTrust's finances so that participants could properly assess the risks of investing in the stock.
- In *Morrison v.* MoneyGram *Int'l, Inc.*, No. 08-cv-01121 (D. Minn. Oct. 20, 2010), a district court preliminarily approved a $4.5 million settlement of an employer stock drop class action.
- In *Kanawi v. Bechtel Corp*., No. C 06-05566 (N.D. Cal. Oct. 12, 2010), the parties reached a $18.5 million settlement of plaintiffs' claims that the plan fiduciaries breached their fiduciary duties by paying excessive fees for to a Bechtel subsidiary to manage the Plan's investments.

Our ERISA Litigation Practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation Practice defends complex and class action employee benefits litigation.

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